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No. 92-1238

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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Respondents Navajo Nation, et al., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 22, 1992.

STATEMENT OF THE CASE

I. Facts

Petitioners receive federal funds under Title XX of the Social Security Act, 42 U.S.C. § 1397 *et seq.* to provide

social services to residents of New Mexico. *Navajo Nation v. State of New Mexico*, No. 85-576-M Civil, slip op. at 2 (D.N.M. July 15, 1991). Petitioners' Appendix at 13. Petitioners do not utilize state general funds to provide Title XX social services, but only allocate federal funds among the qualifying programs for this purpose.

Petitioners provide few direct social services to Navajos residing in New Mexico, and none in the areas of protective services or home care. *Id.* at 5. Instead, since 1975, the petitioner contracted with the Navajo Nation to provide Title XX social services to Navajo residents of Navajo Indian Country in New Mexico. *Id.* at 5.

In June 1985, the State of New Mexico, Division of Social Services recommended that petitioners fund a contract with the Navajo Nation in the amount of $446,277 to provide Title XX services to Navajos residing in the portion of Navajo Indian Country within New Mexico. *Id.* at 7. This amount was $20,000 less than the amount which had been allocated in the previous year. Petitioners generated the contract documents and the Chairman of the Navajo Nation Council executed the contract on behalf of the Navajo Nation.

At that time Mr. Juan Vigil, Secretary of the New Mexico Human Services Department, was responsible for allocation of the Title XX federal funds received by New Mexico as well as ensuring compliance with a court order[1] to which the New Mexico Human Services Department had stipulated in November 1984 which required

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[1] *Wolf v. New Mexico*, No. CIV 80-623-JB (D.N.M. Nov. 21, 1984).

the maintenance of citizen's review boards. *Id.* at 8-9. $168,000 of the funds needed for these boards were not budgeted for the state fiscal year in either federal or state general funds.

Vigil examined several potential sources to make up the shortfall, and every funding alternative had its drawbacks: reduced services, state employee layoffs, dissatisfied constituents, and angry legislators. Vigil wanted to avoid adjusting the Division of Social Services direct services budget, and avoid reducing contracts across-the-board, even though such a reduction would reduce Title XX services equally throughout the state, primarily because he wanted to avoid the political repercussions of a statewide service reduction. *Id.* at 9-10. Faced with this dilemma, he made an expedient, and unconstitutional, decision. *Id.* at 10.

As a solution to his problem, Vigil took all of the one hundred sixty eight thousand dollars ($168,000) needed for the review boards from the contract with the Navajos. The effect of that decision was that only the Navajo population would shoulder the impacts of the service reduction. Only Navajo employees were laid off. Only services to Navajo were eliminated as a consequence of Vigil's actions, and the threat of political reprisals was minimized. To preserve his political standing elsewhere in the State, Navajo Indian Country Title XX contract funds were cut forty percent (40%). Forty percent (40%) of home care workers in the New Mexico portion of Navajo Indian Country were terminated. The number of clients that could be served dropped from 400 to 240.

It was not just in 1985 that the Navajos bore the burden of Vigil's unconstitutional action. In every year from 1985 through the trial of this case in 1991, petitioners primarily based Title XX contract funding on the level of funding in the previous year. *Id.* at 10. Thus, from 1985 through 1991, Navajos residing in New Mexico continued to suffer the disparate impact of the unconstitutional 1985 funding cut.

Certain of the facts asserted by petitioners are misleading. These alleged facts were rejected by the trial court.[2]

Because the Tenth Circuit Court of Appeals determined that the trial court's findings were supported by the trial record, it rejected petitioners' argument that the trial court's findings of fact were clearly erroneous.

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[2] In some instances the "facts" asserted by petitioners directly contradict the findings of the trial court. For example, petitioners advise this Court that, "Secretary Vigil testified that home care programs, other than the Navajo Nation program, could not remain viable if funding to those programs was reduced." Petition at 4. The trial court found that "[o]ther contracts could have been reduced along with reductions to the Navajo contract without destroying the viability of their programs." *Navajo Nation v. State of New Mexico,* No. 85-576-M Civil, slip op. at 9 (D.N.M. July 15, 1991). Petitioners claim that "[i]t was [Vigil's] opinion that only the Navajo Nation program was of sufficient size to withstand a funding cut and remain viable." Petition at 5. However, the trial court found that "[t]he decision to obtain funding for the citizen review boards only from the Navajo contract was based primarily on concerns about political retaliation if cuts were made elsewhere in the state." *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 9-10 (D.N.M. July 15, 1991). Petitioners attempt to have this Court redecide issues of fact.

Navajo Nation v. State of New Mexico, 975 F.2d 741, 745 (10th Cir. 1992).

II. Proceedings Below

The trial court examined the historical relationship between Navajos and the petitioners, the history of petitioners' administration of the Title XX program, the departures from the procedural and substantive norms in the decision-making process, the disparate impact of the decision and petitioners' justifications for their actions. *Navajo Nation v. State of New Mexico*, No. 86-576-M Civil, slip op. at 11 (D.N.M. July 15, 1991). The trial court concluded that the funding reduction was both a facially discriminatory act and was motivated in part by an intent to discriminate against Navajos in violation of the right of Navajo Indians to the equal protection of the law. *Id.* Respondents' claims for damages were held to be barred by the operation of the Eleventh Amendment; however, the court ordered a restoration of funding in 1991 and subsequent years to eliminate the ongoing effects of the Constitutional violation. *Id.* at 12-13.

The trial court made factual findings about each of the factors this Court has held to be necessary when a court determines whether an individual operating under color of state law has acted with invidious discriminatory intent. *Id.* at 10-11. The factual record fully supports the trial court's legal conclusions and, as demonstrated below, those conclusions fully warrant the declaratory and injunctive relief awarded by the court.

The trial court held that Vigil had denied Navajos equal protection by cutting federal Title XX funds for

social services, and determined that the constitutional deprivation continued from 1985 through the time of trial. As a remedy, the court required petitioners to allocate in 1991 and future years at least the level of federal Title XX funding for Navajo social services which Navajos would have received absent the unconstitutional actions of petitioners in 1985. The trial court allowed the petitioners to allocate federal title XX funds at a lower level, if they could justify the lower allocation on the basis of reduced need. *Id.* at 13.

The Tenth Circuit determined that the findings of the trial court were fully supported by the trial record. *Navajo Nation v. State of New Mexico*, 975 F.2d 741, 742 (10th Cir. 1992). The Tenth Circuit concluded that the findings were not "clearly erroneous". *Id.* at 745. The Tenth Circuit found that petitioners had invidiously discriminated against Navajos, and that the prospective injunctive relief was an appropriate remedy for the continuing deprivation of equal protection under applicable precedent from this Court. *Id.* at 745-746. Accordingly, the Tenth Circuit properly upheld the decision of the trial court.

The Tenth Circuit decided that it need not reach the issue of whether the trial court was correct in finding that the cuts to Navajo social services were facially discriminatory, because the "district court's decision stands easily on its alternative disparate analysis." *Id.* at 743.[3]

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[3] Respondents continue to assert that the trial court was correct in its decision that the facially discriminatory actions of petitioners constitute a separate and sufficient basis for the prospective injunctive relief.

REASONS FOR DENYING THE WRIT

I. Summary of the Argument

A. Grounds for Grant of Certiorari

This case presents neither of the factors under which this Court should exercise its discretion to grant a review on writ of certiorari. This case does not present, "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1.C. Nor did the Tenth Circuit "decide a federal question in a way that conflicts with applicable decisions of this Court." *Id.*

B. Abuse of Discretion

Petitioners have challenged the fact finding of the trial court; however, this Court will not, absent a very obvious and exceptional showing of error, review findings of fact. *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987). The standard for review in such a case requires that the findings be "clearly erroneous" to merit review by this Court. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). While petitioners have attempted to assert this case as an important Eleventh Amendment matter, it is simply an alleged abuse of discretion case.

C. Eleventh Amendment Claims

The trial court granted prospective relief against petitioners consistent with the principles enunciated in *Ex Parte Young*, 209 U.S. 123 (1908). The prospective injunctive relief imposed was consistent with the exceptions to

Eleventh Amendment bars to suit against the State contemplated in *Ex Parte Young* and its progeny. See *Papasan v. Allain,* 478 U.S. 265 (1986). The equitable remedy fashioned by the trial court was designed to rectify an ongoing violation of federal law.

The trial court's grant of prospective relief met the requirements of *Edelman v. Jordan,* 415 U.S. 651 (1974). Clear distinctions exist between the circumstances of *Edelman* and this case. The trial court denied the Navajo Nation compensatory relief for the years between 1985 and 1991 and granted only declaratory and prospective injunctive relief. Petitioners' reliance on cases which cite the Eleventh Amendment prohibition against the use of state funds to compensate aggrieved parties for past instances of discrimination is misplaced where the injunctive relief is prospective in nature, not retroactive or compensatory.

D. Scope of Prospective Injunction

The trial court was well within its equitable powers in granting prospective injunctive relief which requires petitioners to fund Navajo Title XX social services at a specific minimum amount. The cases which petitioners raise as authority are easily distinguishable from this case, where there was a continuing constitutional violation.

No basis exists for a Writ of Certiorari.

II. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW AN ALLEGED ABUSE OF DISCRETION.

Petitioners' request for a Writ of Certiorari is ostensibly based on their assertion that an important federal question has been raised in this case; however, no such question exists. Petitioners' challenge is actually to the fact finding of the trial court, and is the integral component of their petition. Petition at 5-10.[4]

The United States Supreme Court will not grant a writ of certiorari to review evidence or discuss specific facts, *United States v. Johnston*, 268 U.S. 220 (1925), to review inferences drawn from evidence, *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938), or to review judgments based solely on questions of fact, *National Labor Relations Board v. Waterman S.S. Corporation*, 309 U.S. 206 (1940). Findings of fact shall not be set aside unless clearly erroneous. Federal Rule of

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[4] Petitioners attack the trial court's finding that Vigil's primary consideration to cut Navajo Title XX contract funding was based on concerns about political retaliation if cuts were made elsewhere in the state. *Navajo Nation v. State of New Mexico*, No. 86-576-M Civil, slip op. at 9-10 (D.N.M. July 15, 1991). Petitioners' continued assertion that Vigil's decision was based on the fact that only the Navajo contract could sustain a funding cut and remain viable, Petition at 5, ignores the specific finding of the trial court that other programs could have sustained a funding cut and remained viable. *Id.*

Moreover, petitioners continue to attack the finding of the trial court that, since 1983 the amount of funding received by Title XX contractors has been based primarily on the amount they received in the previous year, *id.* at 21, arguing that the trial court erred in this factual finding. Petition, at 9.

Civil Procedure 52(a); *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987).[5] In the absence of a very obvious and exceptional showing of error, this Court should affirm the determinations of the lower courts.

In this case, the Tenth Circuit reviewed the record and accepted the findings of the trial court relative to the motivation of the defendants to intentionally discriminate against Navajos. *Navajo Nation v. State of New Mexico*, 975 F.2d 741, 745 (10th Cir. 1992). The Tenth Circuit upheld the finding of the trial court regarding the political motivation of the funding cut and the viability of funding cuts to other programs. *Id.* The Tenth Circuit upheld the finding that the constitutional violation was ongoing and continuous. *Id.* at 746. This Court should not grant a Writ of Certiorari in order to review the findings of fact.[6]

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[5] In *Goodman*, this Court stated, "The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below, having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task." 482 U.S. at 665.

[6] Petitioners herein always have the option of moving the district court to modify the relief granted if the facts underlying the injunction have changed. *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

III. THE TRIAL COURT GRANTED APPROPRIATE PROSPECTIVE INJUNCTIVE RELIEF CONSISTENT WITH THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The trial court decided this case in accord with this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), which established an exception to the general Eleventh Amendment bar in situations wherein injunctive relief is sought against a state official who performs acts which violate the Federal Constitution. Here, as in *Young*, the trial court had the authority to issue an injunction to prevent continuing unconstitutional actions of state officials.

Petitioners' reliance on *Papasan v. Allain*, 478 U.S. 265 (1986), is misplaced. *Papasan* states that the grant of injunctive relief against a state official to "bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." 478 U.S. at 278. Here no state general funds are involved, as only federal funds are allocated by petitioners. This fact obviates the need for an Eleventh Amendment analysis.[7]

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[7] In this case, the injunctive relief granted by the trial court involves the allocation of federal funds and not the expenditure of state general funds. In that aspect, the facts in this case more closely resemble those in *Cronen v. Texas Department of Human Services*, 977 F.2d 934 (5th Cir. 1992), *Robinson v. Block*, 869 F.2d 202 (3rd Cir. 1989), and *Bennett v. White*, 865 F.2d 1395 (3rd Cir. 1989). These cases stand for the principle that the Eleventh Amendment does not apply to suits against state officials, in their official capacity, where the funds at issue are federal funds and not state general funds.

The courts below recognized that the current violation of equal protection stems from the actions of Vigil in 1985, and that Navajos continue to suffer from the disparity in distribution of Title XX funds. The prospective injunctive relief granted by the trial court does nothing more than to correct the disparity created in 1985 due to petitioners' allocation scheme.

This case stands in stark contrast to the situation in *Green v. Mansour,* 474 U.S. 64 (1985), relied on by the petitioners. Petitioners have continued to base funding levels for Navajo social services on an unconstitutional 1985 action. *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 12 (D.N.M. July 15, 1991). Petitioners "continue to deny that the decision in 1985 to cut the funding of the Navajo Nation Title XX program and the current funding of the program constitutes purposeful discrimination against Navajos," Petition at 8, and argue that restoration of the pre-discrimination level of funding is beyond the equitable powers of the federal courts to order. *Id.* at 21. This is precisely the type of constitutional violation which requires an injunction.

Green makes it clear that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68. The reason that declaratory and notice relief were barred in *Green* is that there was, "no claimed continuing violation of federal law and therefore no occasion to issue an injunction." *Id.* at 73.[8]

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[8] In *Green,* this Court was presented with a fact situation wherein the state officials had modified their actions to comply

This Court made its decision against a backdrop of state action where there was no "threat of state officials violating the repealed law in the future." *Id.* at 73.

This case is similarly distinguishable from *Kelley v. Metropolitan County Board of Education,* 836 F.2d 986 (6th Cir. 1987). In *Kelley,* the plaintiffs had "long since won their case." 836 F.2d at 989. The educational and transportation program enhancements required by the district court had long since been implemented by the defendants. It was with this factual predicate that the Sixth Circuit determined that "the vitality of the Supremacy Clause of the United States Constitution will not suffer in any way from our reversal of the district court's order." *Id.* at 990.

Here, the injunctive relief was granted at the same time that the trial court determined that petitioners were continuing a course of unconstitutional deprivation against Navajos begun in 1985. As distinguished from the situation in *Kelley,* Navajos were not receiving equal protection prior to the grant of prospective injunctive relief by the trial court. In this case, affirmance of the prospective injunctive relief granted to Navajos is necessary to maintain the vitality of the Supremacy Clause.

Petitioners' reliance on *Missouri v. Jenkins,* 495 U.S. 33 (1990) again illustrates the deficiency of their petition for review. Petitioners cite *Jenkins* for the principle that "one

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with federal law. 474 U.S. at 65. In this case, the petitioners insist on continuing their violations of federal law.

of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." 495 U.S. at 51; Petition at 19. However, they have truncated this reference to exclude the full expression of this Court, which continued on to state, "Especially is this true where, as here, those institutions are ready, willing, and – but for the operation of state law curtailing their powers – able to remedy the deprivation of constitutional rights themselves." 495 U.S. at 51.

Here, petitioners are neither ready, nor willing to remedy the deprivation of constitutional rights themselves. Indeed, they continue to deny that they have taken unconstitutional action against Navajos. Petition at 8. In only one aspect are petitioners in this case in the same position as petitioners in *Missouri v. Jenkins,* 495 U.S. 33 (1990). They are able to take remedial action to prospectively correct their unconstitutional behavior by restoring the level of Title XX funding for Navajo social services to that amount which had been determined appropriate and necessary prior to their discriminatory actions in 1985.

In *Jenkins,* this Court granted certiorari on the issue of whether the district court had the authority to raise the local property tax which would be required to fund the remedial order. *Id.* at 37. This Court reversed the district court on the limited holding that the district court lacked the power to actually impose the tax itself. *Id.* at 52. Here it is clear that the trial court has not attempted to impose a tax.

While petitioners in *Jenkins* claimed that the remedial order in that case exceeded the equitable powers of the district court, this Court rejected their argument. *Id.* at 53. In Jenkins, the remedial order required the petitioner to undertake a varied set of new or enhanced education and related programs, the cost of which was well in excess of $37 million. *Id.* at 38, n.4.

The prospective injunctive relief granted by the trial court in this case is modest and appropriate. Petitioners obfuscate the issues by focusing on the amount of Title XX funding which is involved in the prospective injunctive relief. Petition at 20. The amount at issue is merely the difference between the figure of $446,277 and the contract amount at which the petitioners would otherwise fund federal Title XX social services for Navajos. In no year between 1985 and 1991 has this difference exceeded $200,000.

Petitioners argue that the trial court exceeded its equitable powers by prospectively restoring in 1991 what petitioners admitted was the appropriate baseline level of funding for Navajo social services in 1985.[9] In light of these conditions and established case law, it is puzzling why petitioners argue that the trial court exceeded its equitable powers by its grant of prospective injunctive relief.

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[9] Petitioners have conceded that "those who are familiar with the Navajo people and their needs recognize that, at least in the foreseeable future, the state will never be able to prove that there is a lesser need for services." Petition at 18.

Petitioners' reliance on *Edelman v. Jordan*, 415 U.S. 651 (1974), is misplaced. In *Edelman*, this Court reversed what was clearly a retroactive grant of monetary damages from state funds. This Court recognized that the district court's decree, "requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose [individual Social Security] applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

This case does not involve payment of an accrued monetary liability. It prospectively requires the allocation of federal Title XX funds to the Navajo Nation at the minimum level ordered by the trial court as a necessary consequence of compliance with equal protection standards. In that manner, this case is clearly distinguishable from *Edelman*.

IV. THE COURT OF APPEALS CORRECTLY AFFIRMED THE PROSPECTIVE INJUNCTIVE RELIEF AS A REMEDY FOR A CONTINUING VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners have not maintained and do not allege herein that they revisited their 1985 decision to cut the level of Title XX funding for Navajo social services. Even the facts asserted in their Petition show that the baseline level of federal Title XX funding has never been restored since their unconstitutional action in 1985. Petition at 6-7.

The 1985 funding cut was an impermissible, unconstitutional action by petitioners against Navajos. As all subsequent funding allocations were based on the same unconstitutional act, they share that same discriminatory taint.

The trial court found that, "[b]ecause the amount of funding is based each year on the previous year's amount, the Tribe's present level of funding is the result of defendants' unconstitutional decision in 1985." *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 12 (D.N.M. July 15, 1991). The Tenth Circuit affirmed, reasoning that "[i]f the Navajo Nation was receiving equal treatment before the unilateral cut, it must afterwards have been receiving proportionately less. Moreover, because each year's funding is determined according to the previous year's, the disparity continues to this day." *Navajo Nation v. State of New Mexico,* 975 F.2d 741, 746 (10th Cir. 1992).

The discussions of case law cited in the first portion of their Petition are equally applicable to their second argument. The cases cited by petitioners, *Kelley, Green, Edelman,* and *Jenkins* are all distinguishable from this case.[10]

Petitioners misunderstand that the on-going constitutional violations arise from petitioners' methodology of determining prospective funding allocations based on the previous year's funding allocation. The trial court in this case fashioned an equitable remedy which was tailored to the circumstances of this continuing violation of federal

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[10] Inasmuch as these cases are distinguished above, the respondents will not repeat the analysis here.

law, and merely restored to Navajos the equal protection of which they were continuously deprived from 1985 onward.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied and the trial court's award affirmed in its entirety.

Respectfully submitted,

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